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Colonial America Today: U.S. Empire and the Political Status of Native American Nations

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A renaissance of tribal self-determination has been underway in the United States since the mid-1970s, and it is in many respects still accelerating. Indigenous people and tribes have devised flourishing new models of self-governance by seizing onto and driving forward changes in federal law enabling tribes to take over the provision of an increasing constellation of federal trust services, from housing to health to justice to land management and beyond. The result has been greater autonomy for many tribes in the United States today to author the terms of their social, economic, and political lives than at any time since the nineteenth century. Yet the reality of invigorated tribal self-determination has not banished another reality with which it is in uneasy tension: the deep, ongoing entanglement of the terms, character, powers, and limits of tribal self-governance today with the political structures, policy decisions, and asserted institutional supremacy of a separate sovereign, the United States. Further reflecting this entanglement, the greatest threats to tribal self-determination, self-governance, and sovereignty today emerge from the same political circumstances as its advancement: deep entanglement with a U.S. political context and system that tribes can influence but do not control.

There is a long history in the examination of "The Indian Question" (Walker 1874) in the United States of writing off complex political realities of this sort to the *anomalous* character of the U.S.-Native relationship. It is a

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unique relationship with unique dynamics, the anomaly argument goes. But claims that the U.S-Native relationship is a world-historical political anomaly obscure the deep similarities this relationship exhibits with other cases. We will argue in this article that the relationship to Native people and tribes as envisioned and created by U.S. law and policy, historically and today, is not in its central features an anomaly, but rather an empirically demonstrable and even paradigmatic case of a world-historically prevalent form of political power: formal colonial empire.

This claim is distinct from the question of how indigenous people and tribes have responded to the structures and policies of empire that confront them and what social and political systems they have built to counter or evade these, though these issues are of course intertwined. Our argument here focuses on the form and thrust of U.S. policy—the U.S. political project with respect to indigenous peoples, as revealed historically, but in light of the understanding that peoples who confront empire in the United States, as elsewhere, have done so with creativity and political savvy, and that therefore their political and social existence cannot be reduced to the political projects of a colonial power.

The question of whether or not the United States is an empire has been asked before (Bacevic 2009; Go 2011; Ignatieff 2003; Maier 2006; Porter 2006). But this debate has all too often ignored evidence from the political status of Native people and tribes in the United States. While U.S. politicians have largely hewed to the long-standing trope that the United States—a republic born from an anti-colonial struggle—is not and cannot be an empire, scholarly opinion has come to a wider range of conclusions. Yet all sides in these debates have demonstrated a strong tendency to look for evidence far away, or in the past, or both. They have looked, for instance, to cases including Puerto Rico and Vietnam, Iraq, and Afghanistan, to the structure of multi-lateral institutions and of neoliberal trade deals to find their evidence for or against American empire. Certainly, the history of white westward expansion, including the acquisition of Alaska and Hawai`i, often joins the U.S. colonization of Puerto Rico, the Philippines, and other peoples and places in making the case for the *historical* fact of U.S. colonialism (Go 2008; Williams 1980). But political, constitutional, and policy circumstances involving Native people, tribes, and the U.S. federal and state governments have had a notably small presence in disputes about U.S. empire *today* (Frickey 1993; Left Quarter Collective 2009; Steinmetz 2014).

The most significant exception to this turning of the analytical gaze to past and distant episodes for evidence for or against U.S. empire are indigenous and postcolonial studies scholars. Indeed, that the United States has and continues to practice the politics and governing strategies of colonialism will seem a commonplace to scholars from these traditions (though not, we suspect, to scholars working on even closely related questions from other disciplines and perspectives). These contributions, however, have largely not been aimed at the U.S.

empire debate or at the comparative analysis of empire and imperialism more generally. The dominant theoretical framework for this analysis has intentionally parted ways with an analytical focus on empire, finding it and the comparisons with other cases of paradigmatic, European colonialism too limiting. That literature has instead settled on "settler colonialism" (Glenn 2015; Goldstein 2014; Coulthard 2014; Veracini 2010; Steinman 2012; Bacon 2017) as a preferred analytical framework for understanding the relationship between Native peoples and other aspects of U.S. society and government. The settler colonialism concept has allowed scholars to range beyond the limits of a narrower political concept of empire to examine the full consequences of the erasure of the Native and the indigenization of the settler in the specific and highly consolidated territorial, social, political, economic, racial, and cultural configuration of the United States today.

While in general accord with this literature, we think that empire remains an important way to conceptualize the political dimension of settler colonialism in the United States. More specifically, it opens lines of comparative analysis that can help to generate new questions and directions of inquiry regarding both the character of contemporary U.S. colonialism and that of colonialism more generally. By examining the contemporary United States through the lens of colonial empire, we also aim to draw the attention of scholars of empire and political sociology to a case that they have too often misunderstood and overlooked.

We build this argument, first, by laying out a basic definition of formal colonial empire and by specifying three defining elements of this political form. We then turn to an analysis of the political status of Native tribes today in each of these areas and draw comparisons with well-known historical cases of formal colonial empire. In our conclusion we discuss the analytical, substantive, and moral implications of this analysis.

DEFINITIONS OF EMPIRE

The definition of empire we use here follows Steinmetz, who distinguishes between imperialism, a broader category involving the "increase [of] power by conquest," and the narrower concept of empire, defined by Doyle as a "relationship of political control imposed by some political societies over the effective sovereignty of other political societies" (quoted in Steinmetz 2013: 9). Doyle's definition includes two features that approximate a consensus core of most definitions of empire: empire must involve the exercise of *sovereignty* over *others*. "Imperial control works on the plane of sovereignty," Chatterjee writes (2012: 337), so if a relationship cannot be said to involve the formal and practical impairment of sovereignty then it is not empire in the narrow sense that is our focus. Similarly, if the case for the social and political otherness of the colonizer and the colonized cannot be empirically sustained, then the relationship does not meet the definition of empire, an admittedly bloodless

formulation of Chatterjee's claim that the "rule of colonial difference" and its insistence on the incorrigible racial inferiority of the colonized are defining features of empire (1993: 19, 23; Go 2004). We operationalize "impaired sovereignty" and "otherness" in the following sections.

Colonialism narrows this definition further as a form of empire involving more intensive control over a colonized territory and population. Mahoney writes, "Colonialism is marked by a state's successful claim to sovereignty over a foreign land … founded in part upon the colonizing state's proven ability to implant settlers, maintain governance structures, and extract resources in the territory. This makes colonialism a more thoroughgoing form of territorial control than imperialism … colonialism renders subordinate all prior political entities that could once lay claim to … final authority over territorial inhabitants" (2010: 2). Mahoney's definition is particularly helpful in clarifying that the boundaries of the concept of a colonial empire do not run through the utter extinguishment of original claims to sovereignty, but rather involve a successful claim to *ultimate* authority over foreign populations and territories.

Colonialism can take at least two forms: the direct colonization pattern or indirect rule. The former involves the "installation of settlers"(Steinmetz 2013: 11) and of institutions that enforce the political forms and cultural preoccupations of the colonizer. The indirect rule pattern, which is our focus in this article, does not totally supplant indigenous forms of governance and ways of life, but rather transforms and sometimes creates Native institutions in ways that turn them into tools of colonial domination. As Frederick Lugard, one of its principal practitioners and theorists, put it, indirect rule involves "rule through chiefs" (Lugard 1922: 193), or as Myers has written, "[imperial] sovereignty … layered atop … indigenous institutions" (2008: 2). Indirect rule therefore involves elements of self-rule that are ultimately subject to limits set by the colonial power.

From these definitions we can distill three key features of a formal colonial empire based on indirect rule. First, the purported colonial power must *formally impair and subordinate the sovereignty* of the colonized community to the ultimate sovereignty of the colonial power through constitutional and legal measures. Second, the colonial power must exert a *thoroughgoing governance and administration* of colonized populations and territories through partially co-opted Native institutions. Third, the colonized and colonizing communities must be "*other*" with respect to each other, and that ongoing otherness will be part of the apparatus of colonial governance. This three-part rubric guides our comparative analysis in the following sections and serves to establish our analysis of the stance of the contemporary U.S. government to Native people and tribes as a paradigmatic case of indirect colonial rule.[1]

[1] While we agree with the argument that many purported nation-states involve historical or ongoing elements of empire (Adams and Steinmetz 2015), with this rubric we distinguish

Throughout, we also attend to another important dimension of colonialism and empire, the *"influence of the colonized on colonial rule"* (Steinmetz 2014: 90–91). While the history of empires is too often written as a history of domination emanating from the metropole and having its effects in the colonies, recent historiographical trends have rightly emphasized the idea that empire is a two-way street, with the colonized influencing the character of colonial rule through their responses to it, as well as leaving their imprint on the colonizer's state and society more generally (Brown and Kanouse 2015). The three elements of empire that we focus on, then, are best seen as political forms that emerge from the ongoing interplay of U.S. efforts to impose colonial domination and indigenous peoples' agentic, strategic responses to it.

THE FORMAL IMPAIRMENT OF NATIVE SOVEREIGNTY IN THE UNITED STATES

Prior to the arrival of Europeans, hundreds and perhaps thousands of distinct and self-organizing peoples lived on the territory now called the United States. Since its founding, the United States has built a web of law, politics, policy, and administration that formally impairs the once full sovereignty of these indigenous nations.[2] U.S. state agents, over the course of more than two hundred and fifty years, have strung this now dense web of formal impairment of Native sovereignty around three legal principles: aboriginal title, the subordination of Native sovereignty to U.S. law, and the federal trust responsibility.

Principle One: Aboriginal Title

The Supreme Court's seminal statement of the doctrine of aboriginal title comes from the 1823 case *Johnson v. M'Intosh*. The Court upheld a lower court's invalidation of the transfer of title by representatives of the Piankeshaw nation to Thomas Johnson. It found that the tribe did not have the full title to the land. In a key passage of his opinion for the Court, Chief Justice Marshall explains the principle underlying the decision in this way: "While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in

between polities more generically shaped by imperial dynamics and cases of ongoing, formal colonial empire. We conceptualize formal colonial empires as based on policies of indirect rule as specific, empirically determinable political forms, not the hidden generic soul of all polities. Other cases (such as, perhaps, the United Kingdom, China, and Canada) may, of course, also hold up to this label under similar empirical scrutiny.

[2] We will address the applicability of the concept of sovereignty to indigenous polities (Alfred 1999; Nadasdy 2012) presently.

possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy."[3]

The Piankeshaw, according to the Court, could not have sold their land to Johnson because the British had ultimate dominion. Following the Revolution, "the United States … unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country."[4] This ancient European legal fiction held that the "discovery" and occupation of lands inhabited only by "fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest"[5] conveyed ultimate title to the "civilized" nation. In the context of *Johnson*, the distinction between absolute and aboriginal title is actually an effort to achieve two goals: to affirm the enforceable title of Native people to at least those territories that they used in ways that seemed productive to whites,[6] and also to assert the rights of the United States to exclude efforts of any of the other empires with which it was in competition from acquiring Indian land (Ball 2000: 1192). It is in this latter sense that *Johnson* describes absolute title narrowly as "an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest."[7] *Johnson*'s partition of sovereignty, however, did not end up having such limited effects, and was eventually interpreted as a general subordination of the Indians' "rights to complete sovereignty, as independent nations" to the "overriding sovereignty" of the United States (*Oliphant v. Suquamish Indian Tribe* 435 U.S. 209, 1978).

In practice, *Johnson*'s doctrine of aboriginal title became the first blow against indigenous territorial sovereignty. Treaties were the subsequent blows. Between the 1778 Treaty with the Delaware through Congress' prohibition of treaty-making with Native nations in the Indian Appropriation Act of 1871, the United States struck hundreds of treaties with indigenous nations under Article II of its Constitution. One of the central objectives of this body of agreements from the perspective of the United States was the extinguishment of aboriginal title over vast tracts of land to make way for white settlement.

These treaties have a complicated history and, as Banner (2007) has argued, the view that Native people were coerced and duped into giving up their land through these treaties is too simplistic. Treaties, and after 1871 agreements with tribes, were struck under many different circumstances, with different motivations from both sides. Many of them did involve chicanery or outright fraud on the part of U.S. agents, many more presumed and then

[3] *Johnson v. M'Intosh*, 21 U.S. 574 (1823).
[4] Ibid., 587.
[5] Ibid., 590. On the role of myths about Indian land use and particularly hunting in the expropriation of territory, see Banner 2007.
[6] *Johnson v. M'Intosh*, 21 U.S. 603 (1823).
[7] *Johnson v. M'Intosh*, 21 U.S. 587 (1823).

imposed European epistemological and political forms, and likewise many were struck in the shadow of military or settler violence (Prucha 1997; Bradford 2005: 15–16; Stark 2012). These treaties, though, were also an acknowledgment of the nation-to-nation relationship between the United States and tribes, and as such remain crucial to assertions of tribal sovereignty and to understandings of the federal trust responsibility through the present. Indigenous people used treaties to try to halt, manage, and survive white encroachment and ultimately territorial envelopment. The result of these multiple registers of meaning and different strategic goals (Williams 1997) was a body of treaties that often involved a Native nation ceding their occupancy rights over a defined territory under U.S. law in return for money, services, occupancy rights to other lands, and guarantees of federal protection. For many white settlers and government agents, though, treaties were, in the first place, tools of territorial cleansing. It was the doctrine of aboriginal title and its distinction between "ownership," a powerfully protected status under early American law, and "occupancy," a significantly less protected status that established the legal rationale for the relatively cheap extinguishment of Native people's territorial rights in these treaties (Banner 2007: 150; Kades 2001: 67), and its impacts have continued to explicitly shape the status of Native property rights through to the present (e.g., *Tee-Hit-Ton Indians v. United States*, 1955; *United States v. Dann*, 1985).

The parallels between the doctrine of aboriginal title in the United States and in other empires are straightforward, not least because the United States derived its doctrine of aboriginal title directly from the doctrine of discovery as applied by Europeans since the beginning of the early modern age of empire.[8] The *Treaty of Tordesillas* and the papal bulls of donation from the 1490s—to cite one of the earliest examples of a form of thought running through essentially all European empires—all rest on this principle in their purported grant of title, divided between Portugal and Spain, of "all islands and mainlands found and to be found, discovered and to be discovered towards the west and south," along with all of the "dominions, cities, camps, places, and villages" found in those places so long as "barbarous nations" and not Christians inhabited them, formulations that remain strikingly intact over three hundred years later in *Johnson*.

And just as the mass-transfer of land in the United States from Native to European occupation occurred through a flurry of treaties that were often coerced and unequal, the "Scramble for Africa" in the nineteenth century was in important respects also a paper chase to sign treaties with Native chiefs. European empires took treaties to be sufficient instruments to effect the partition of sovereignty and cession of ultimate title over the land and

[8] Ibid.

rights of governance to a colonial power or the trading company representing it. For example, in a treaty with the Imperial British East Africa Company, represented by Frederick Lugard, Mwanga the Kabaka of Buganda in 1892 agreed to "acknowledge the Suzerainty of the Company, and that my kingdom is under the British sphere of influence … I undertake to fly the flag of the Company, and no other, at my capital and throughout my kingdom; and to make no treaties with, grant no kind of concessions to, nor allow to settle in my kingdom and acquire lands or hold offices of State, any Europeans of whatever nationality without the knowledge and consent of the Company's representative in Uganda."[9] The treaty created an impaired Native sovereignty over the territory and international relations of Buganda that became the basis for the establishment of Uganda as a British protectorate with ultimate sovereignty ceded to the British crown. British chartered companies struck hundreds of similar agreements with Native nations, and other European empires struck hundreds more, with roughly similar dynamics occurring in European Asian empires in pursuit of the same impairment of Native sovereignty and assertion of European colonial sovereign and territorial rights (Fisher 1998: 10, 147). Throughout the history of European empire, arrangements like aboriginal title aimed at excluding interference by competing empires and states have also strengthened the capacity of colonial states and settlers to expropriate land and resources from the indigenous people whose sovereignty was so curtailed, exactly as occurred in the U.S. case.

Principle Two: The Subordination of Native Sovereignty to United States Law

Besides laying the foundations of aboriginal title, the Supreme Court has also been at the center of the subordination of Native sovereignty to U.S. law. While in *Worcester v. Georgia* (1832) the Court established crucial limits on the ability of the states to interfere with Native sovereignty that remain a crucial element of Indian Law today, its conclusions with respect to the federal government were the opposite. As Blumm writes, "The [*Johnson*] decision assumed that Indian title issues were matters of domestic federal law, not international law, an assumption that would prove disastrous to tribal proprietary rights and sovereign authority over the next century and a half" (2011: 985). This principle of the supremacy of federal law has had two sweeping consequences for establishing the legal form of impaired Native sovereignty. First, U.S. courts operating under U.S. law have become the sites for the adjudication of the character and limits of Native sovereignty. Second, Congress' legislative power over Native nations and Native sovereignty has come to be understood as limited only by the Constitution and not by any features of that pre-existing sovereignty itself.

[9] Lugard 1892: 56–57.

The influence of the Supreme Court and the federal court system in determining the legal form of impaired Native sovereignty in the United States from the earliest decades after independence through the present is a testament to the significance of the elevation of U.S. courts and law over Native sovereign legislative and judicial power. Federal courts across thousands of cases have interpreted the constitutions and statutes involving tribes in a way that has allowed them to "find tribes divested of inherent powers" (Steele 2016: 666; Duthu 1994; Getches 1996), even when the statutory basis for this disempowerment is ambiguous.[10] The key to this construction of judicial power is that it claimed for the U.S. legal system the prerogative to decide these questions of sovereignty (Chatterjee 2012: 337), a doctrine that has nourished a flourishing practice of U.S. adjudication of Native sovereignty. Over the centuries, the Supreme Court has swung between relatively protective attitudes toward Native sovereignty and deeply corrosive ones. Particularly since the 1980s, old doctrines that had drawn lines between state laws and courts and Native sovereignty have been redrawn, punctured, or erased. These developments have included the diminishment of tribal sovereignty in favor of state law with regard to taxation (*Cotton Petroleum v. New Mexico*, 1989), the prevention of tribal rights to enforce restrictions on hunting and fishing on reservation land (*Montana v. United States*, 1981; *South Dakota v. Bourland*, 1993), to enforce zoning ordinances (*Brendale v. Confederated Tribes and Bands of Yakima Nation*, 1989), to exert tribal court jurisdiction over civil cases between non-Indians occurring on Indian land (*Strate v. A-1 Contractors*, 1997), to enforce tribal law against non-tribal members (*Duro v. Reina*, 1990), and the extinguishment of otherwise valid tribal land title claims against state and local governments due to the passage of time (*City of Sherrill v. Oneida Indian Nation of N.Y.*, 2005).

The consequences of U.S. legal supremacy are on particularly vivid display in the erosion of tribal authority over criminal matters, one of the most basic powers of sovereign nations. Native criminal jurisdiction today is a patchwork of remnants and stripped powers. Tribal courts in the United States face stringent limits on their jurisdiction depending on the Indian-status of the perpetrator and victim of a crime, on the nature of the crime, and on the jurisdictional claims of state and federal courts.[11] This patchwork of judicial powers is the result of a long history of restrictions imposed on Native criminal jurisdiction, itself driven in part by the desire to shield the increasing numbers of non-Indians on Indian land from the later nineteenth century onward from tribal criminal jurisdiction. Most notably, the Major Crimes Act of 1885 stripped Native legal bodies of jurisdiction over seven major crimes such as

[10] Our thanks to an anonymous *CSSH* reviewer for guidance on these points.

[11] For an overview see: http://www.justice.gov/usam/criminal-resource-manual-689-jurisdictional-summary (accessed 3 Dec. 2018).

murder and rape, since expanded by Congress to encompass fifteen crimes. Public Law 280 in 1953 complicated these matters further by delegating some of the federal criminal and civil jurisdiction to state courts in certain states. Recent Supreme Court rulings have further limited the tribal courts, restricting their criminal jurisdiction over non-Indians even for offenses that occur on Native land,[12] and the jurisdiction of tribal courts over state law-enforcement officials executing a search warrant on tribal land against a member.[13]

The elevation of U.S. law over Native sovereignty has led to a strikingly unbounded answer to the question of Congressional power to legislate with respect to tribes: that power is subject only to the Constitution.[14] The iconic statement of this doctrine of "plenary power," came in the Supreme Court's 1903 Lone Wolf decision.[15] In it the Supreme Court found against Lone Wolf, the leader of the Kiowa nation who claimed that Congress had disposed of land in violation of its commitments in the Medicine Lodge Treaty of 1867 and a subsequent treaty with the Kiowa Apache. After a fraudulent pantomime of obtaining the signatures necessary to alter the treaty, Congress authorized President McKinley in 1901[16] to "proclaim the surplus lands open for settlement by white people,"[17] which he did on 4 July 1901,[18] prompting the suit by Lone Wolf et al. The Court determined that Congress' "plenary authority over the tribal relations of the Indians"[19] superseded the claim that the Jerome Commission had not met the requirements for altering the terms of the Medicine Lodge Treaty, giving Congress the power to unilaterally alter treaty terms.

The significance and reach of plenary power has been profound. It has underwritten the power of Congress to legislate with respect to any aspect of Native sovereignty in nearly any manner it chooses. It is the legal presumption that nearly all statutes involving Native nations rest on, including statutes

[12] *Oliphant v. Suquamish Indian Tribe* (1978). Also see *Duro v. Reina* (1990), the 1991 and 2013 amendments to the Indian Civil Rights Act, and *United States v. Lara* (2004).

[13] *Nevada v. Hicks* (2001).

[14] *Seminole Tribe of Florida v. Florida* (1996) provides a recent illustration of the legal reality of this limitation, however, as does *United States v. Sioux Nation of Indians* (1980), even as other cases such as *Tee-Hit-Ton Indians v. United States* (1955) show the ways in which even constitutional protections such as Fifth Amendment prohibitions on takings can be circumvented in favor of Congressional power when they are adjudicated "in the courts of the conqueror" (Echo-Hawk 2010).

[15] However, also see the Cherokee Tobacco case, 78 U.S. 616 (1871), and for a landmark reaffirmation of this principle, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 58 (1974) and (Canby 2009: 131). The Indian Appropriation Act of 1871 provides another blatant example, having denied Native nations the full sovereignty that the ability to make treaties with the United States implied.

[16] Vol. 31, Statutes at Large, p. 1093, c. 846.

[17] *Lone Wolf v. Hitchcock*, 187 U.S. 560 (1903).

[18] William McKinley, 4 July 1901, "Proclamation 460—Opening of Wichita, Comanche, Kiowa, and Apache Indian Lands in Oklahoma."

[19] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

involving law and order, social services, treaties, health, families, the powers of tribal governments, land, environment, and on through the entire gamut of issues on which Congress has seen fit to legislate. We should note one further check on Congress has been the efforts of Native people and tribes to influence the exercise of this tremendous Congressional power as they have mobilized to remake the circumstances of subordinated sovereignty in politically creative ways (Bruyneel 2007), resulting in the passage of measures rectifying some incursions on tribal sovereignty (e.g., the Indian Child Welfare Act, in 1978) and creating new possibilities for the exercise of sovereignty (e.g., the Indian Self-Determination and Educational Assistance Act, in 1975).

This elevation of colonial law provides another site where the U.S. case, historically and through to the present, bears a striking resemblance to developments in other empires. Consider the following description of legal power in the Native States of British India. The Native States were a collection of hundreds of principalities ranging in size and complexity, all of which were subordinated to ultimate British suzerainty, that is, sovereignty, but afforded differing degrees of internal control by the British. In his overview of the British system of colonial government, Nathan summarizes the situation in British India in this way:

> The precise status of a Native State [is] determined in part by treaties … and in part by … a general body of rules and principles expressing the paramount authority of the Crown, while at the same time limiting the sovereignty of every ruling chief—the final interpretation of these rules and principles resting with the British Government…. All of them, in virtue of their territorial rights, in possession of which they have been confirmed by the suzerain or paramount Power, enjoy a measure of internal sovereignty, which varies according to circumstances … in the smaller and less important States, such as Kathiawar, the judicial power of the chiefs is strictly limited to petty offences, all serious crimes being reserved for the decision of British political agents, whose jurisdiction is derived from the inherent prerogative of the paramount Power. Sentences of death or imprisonment for life require confirmation from political agents in all States except the very largest. Over European British subjects criminal jurisdiction may only be exercised by a British High Court (Nathan 1928: 107–9).

The similarities between this jurisdictional picture and that in the United States —ranging from a common removal of Native sovereignty over Europeans, to the limitation of punishments available to Native tribunals, to the assertion of imperial jurisdiction over the most serious crimes (Fisher 1998: 157, 230) —emerge from the same principle of the ultimate supremacy of colonial adjudicatory power over Native power.

We find the same principle in the role of Consular courts in British Africa as alternatives to and checks on Native tribunals, and in the Dutch policy of legal "duality" in Indonesia. This policy, formalized in the mid-nineteenth century, created separate racialized legal tracks, applying the Dutch civil and commercial legal systems "to all European or assimilated residents," while leaving intact traditional and religious justice systems amongst Native

Indonesians and immigrants from elsewhere in Asia "so long as these do not conflict with generally recognized principles of fairness and righteousness."[20] In the Dutch case we see the same erosion of even this retained Native jurisdiction as customary justice systems were increasingly brought under imperial control through police courts that vested magistrates who were not judges with tremendous summary power over Natives (Tjiook-Liem 2011: 119–21) and the *landsraad* courts for Natives where judges applied sentences up through death without the procedural protections or expectations of justice found in cases involving Europeans (Fasseur 1997: 42–43).

The principle behind plenary power is likewise foundational to the history of European empire. In the British dominions, this doctrine took the form of Parliament's ultimate authority to legislate with respect to colonies and the entire empire when it chose. There are many examples of the assertion of this power that we can identify, from the fifteenth century—Poynings' Laws of 1495 asserting the authority of the English Parliament to legislate in Ireland and limiting the ability of the Irish Parliament to legislate—through the eighteenth century—the Declaratory Acts of 1719, reasserting British authority to legislate over Ireland, and 1766, doing the same for the American colonies—and the nineteenth century—the 1865 Colonial Laws Validity Act asserting the ultimate subordination of colonial legislatures to the British Parliament at Westminster. We find similar expressions of sweeping legislative power exerted by colonial powers over colonized lands and people in the British doctrine of repugnancy, which invalidated laws, policies, and institutions repugnant to the "justice or morality of the colonial power" (Ibhawoh 2013: 58), and in systems such as the French Code de L'Indigénat or the Dutch Regeeringsreglementen, comprehensive rules of colonial governance and administration issued under the authority of the European colonial power and imposed on colonies.

Principle Three: The Federal Trust Responsibility

The federal trust responsibility is the third central element of the legal form of impaired Native sovereignty in the United States. We introduce it by way of a second case from the Marshall court that marks an important and extreme vision of this aspect of U.S.-Native relations. The case was brought by the Cherokee Nation against Georgia in pursuit of an injunction against a series of laws through which, the Cherokee argued, Georgia had sought to preempt the Cherokees' ability to govern and to "annihilate the Cherokees as a political society."[21] The Court, however, did not reach this question. The Supreme Court

[20] *Reglement op de Regterlijke Organisatie en het Beleid der Justitie in Nederlandsch-Indie* (*Rules of Judicial Organization and Policies of Justice in Nederlandsch-Indie*), 1846, Amsterdam: J. Müller. Article 9, p. 46.

[21] *Cherokee Nation v. Georgia*, 30 U.S. 15 (1831).

has original jurisdiction only in narrow circumstances, including cases where foreign nations bring suit against any of the states. The Court found that the Cherokee were a nation, but that they were not a *foreign* nation and therefore the Supreme Court did not have original jurisdiction and could not decide the case. Native nations in the United States, Marshall wrote for the majority, should be understood legally not as foreign states, but as, "domestic dependent nations…. [T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their Great Father."[22] Importantly, in this passage the court ties the assertion of the inferior, dependent sovereignty of Native peoples to the (literally paternalistic) duty of protection that the United States had to the Indians. The idea of a duty of protection provides a recurring theme and tension from the earliest times of European colonialism. It occurs, for instance, in documents such as the Papal Bulls enjoining both conversion and protection of Natives. *Cherokee Nation v. Georgia* can in this sense be read as a foundational articulation of this tension in the U.S. case. Alongside further jurisprudence, legislation, and treaties and agreements that likewise asserted the connection between the duty of protection and the diminution of Native sovereignty, it is a useful marker at the origin of the complex history of the federal trust responsibility (Wilkins and Lomawaima 2002: 65–97) so central to the U.S.-Native relationship from the nineteenth century to the present.

The trust responsibility and the duty of protection has had a complicated legacy. On the one hand, it has been the sharp end of the wedge inserting federal power ever deeper into the fabric of Native polities and societies as agents of the United States have justified all manner of interventions under the banner of the federal trust responsibility. For example, the Supreme Court's 1886 decision upholding the Major Crimes Act justifies stripping Native sovereignty in key areas of law enforcement as follows: "Indian tribes are the wards of the nation. They are communities dependent on the United States—dependent largely for their daily food; dependent for their political rights.… From their very weakness and helplessness … there arises the duty of protection, and with it the power."[23] In this incarnation, the duty of protection and the concomitant federal trust responsibility is used, as Canby puts it, as "more of a sword for the government than a shield for the tribes" (2009: 39), stripping tribes of their sovereign authority to enforce their laws on their land. In this "sword" category, the federal duty of protection has been used to justify policies, laws, and legal decisions that have interfered in essentially all aspects of Native life, from boarding schools, to the allotment of Indian land, to the outlawing of Native

[22] *Cherokee Nation v. Georgia*, 30 U.S. 17 (1831).
[23] *United States v. Kagama*, 118 U.S. 383–4 (1886).

cultural practices, to control over Native mineral and grazing rights and far beyond.

This selfsame assertion of a federal duty to protect Native tribes and the power to do so, however, is also foundational to the modern trust responsibilities that tribes so vigorously insist the federal government must fulfill—protection as indeed a shield rather than sword. It is under this aspect of the duty of protection that legislative protections of Native rights, especially against states and non-Indians, has arisen (e.g., Tribal Law and Order Act, 2010; Indian Graves Repatriation Act, 1990; Violence Against Women Reauthorization Act, 2013), as has the system of trust programs and funding streams extending from health care to housing to transportation to land management that have become so central to the renaissance of tribal self-governance since the late 1970s.

This dual significance of the duty of protection, as both the sword of sovereign impairment and the shield of the federal trust responsibility, is no anomaly experienced by Native peoples in the United States. Indeed, in mingling assault and protection it reflects an irony typical of European empire: "protection of the natives" has been the ubiquitous watchword by which regimes have justified the seizure of territory, impairment of Native sovereignty, and imposition of European imperial power (Mamdani 2012: 7–8), as well as policies and practices that legitimately protect Native peoples from incursions by colonists and the ravages of disease, impoverishment, and social breakdown that have also been ubiquitous consequences of colonialism.

Lugard, in a dense reflection on protection as a principle that has justified the seizure of the commanding heights of Native sovereignty by European empires throughout Africa, describes a usage of protection essentially identical with that of the United States with respect to Native peoples:

> The institution of courts of justice, the supervision of native courts, the protection of the peasantry from oppression by their rulers, and the deposition of the latter when incorrigible, the reorganization or imposition of taxation for revenue, the prohibition of slave-raiding or slave-dealing, the restraint on firearms, liquor, and the destruction of game, the disposal in some cases of unused lands or minerals … all these are acts of sovereignty … now formally recognized as the essential duty of the Mandatory Powers, who under the covenant of the League are to be nominated as the protectors and trustees of backward races (1922: 18).

Lugard refers to a European practice of empire that matches the United States one in mingling paternalistic "protections" of Natives from things like their own religious and cultural practices with protections from legitimately threatening encroachments by other parts of the colonizing state and society like enslavement and land theft. As the 1837 "Report of the [British] Parliamentary Select Committee on Aboriginal Tribes" puts it after recounting a litany of destructive encounters from British North America to the Pacific to Asia and Africa, it was imperative to protect against "the desolating effects of the

association of unprincipled Europeans with nations in a ruder state" (p. 59), and to do so the executive needed to protect aboriginal subjects of empire through measures such as the prohibition of land sales by Natives to private parties or colonial representatives unless authorized by the colonial power (p. 118–19) and the prohibition of the sale of spirits to aboriginal people (p. 118). The association between the duty of protection and designated resource flows to programs for Native welfare in the United States trust responsibility likewise invites comparison from other European empires. The Dutch "ethical policy" in Indonesia beginning in 1901, for example, was an attempt to pursue a "policy of moral obligation and preparation for self-government" (Vandenbosch 1933: 52) toward the natives, marking a turn to a more benevolent, paternalistic policy of protection after decades of managing Indonesia on a profit-above-all model. Though its ultimate effects were marginal, the ethical policy sought to expand schooling, advance public health, and promote infrastructure development for Indonesian natives.

GOVERNANCE AND ADMINISTRATION THROUGH INDIRECT RULE

The previous section focused on the formal impairment of Native sovereignty under U.S. law. This one develops a comparative analysis of the governance and administration of Native political and social life in the United States in relation to other situations of colonial rule.

The soul of sovereignty is self-governance, and it is through astonishing feats of will, perseverance, and collective action that through waves of land seizure, tribal termination, forced assimilation, enslavement, and state-sponsored violence Native American tribes have established robust and increasing powers of self-government. Tribal self-government today involves a constellation of powers and authorities, ranging for many tribes over broad and important swaths of life, from health and other human services to criminal justice to education to economic development and beyond (Strommer and Osborne 2014: 3). It contrasts starkly with the situation during the later nineteenth through the middle of the twentieth centuries, when federal bureaucrats directly administered much of reservation life. During this period, "it was the federal government that essentially ran those reservations and the affairs of tribes.… the federal government ran schools, provided health care, provided the law enforcement, administered all manner of welfare programs, leased lands, and managed resources on reservations. Tribal governments and tribal citizens had little if any, input into the design of these programs" (Henson 2008: 20). Today's tribal self-government represents a fundamentally different approach with far greater autonomy for Native people and tribes. It does not, however, represent the end of colonial rule in favor of some other political paradigm. To the contrary, a comparison of the governance and administration of Native peoples in the United States today under contemporary policies and practices of self-governance with evidence from other colonial empires reveals U.S. policy instead as an oscillation

between two distinct but both typically colonial modes of government. While the older pattern matches the direct rule pattern of colonial governance and administration, the new self-governance model itself is a paradigmatic example of colonial indirect rule.

Throughout their history European empires have attempted to get the benefits of colonial rule without bearing the full costs or complexities. Many of Britain's colonies pursued this state of affairs through indirect rule, an effort to create permanent governing efficiencies by devolving certain powers to Natives while still influencing the form, extent, and exercise of those powers and directly wielding others. The main thrust of this turn to "native administration," was to achieve "rule through the Native Chiefs" and other Native institutions.[24] Importantly, through indirect rule Lugard and other administrators did not intend to simply secure the loyalty of Native rulers and allow them to continue as before. Rather, indirect rule required that British agents bring Native institutions into alignment with the "machinery of government"[25] of the empire. The Native institutions would need to be remade in line with the British system, while retaining whatever portion could be salvaged of their traditional legitimacy and authority and creating from scratch other desired Native governance capacities. As one of Lugard's successors put it, "'Indirect Administration' … is designed to adapt for the purposes of local government the tribal institutions which the native peoples have evolved for themselves … moulded or modified as they may be on the advice of British Officers, and by the general control of those officers…. the British Government rules through these native institutions which are regarded as an integral part of the machinery of government … with well-defined powers and functions recognized by Government and by law."[26] Indirect rule thus demands that Native institutions and rulers take over important aspects of governance and administration, but always subject to the ultimate authority of the colonial power. Indirect rule allows self-governance *within* a system of colonial power, as part of the functioning of that system, but not as an alternative or competitor to it (Coulthard 2014).

Indirect rule can be decomposed into two central features: (1) the governance and administration of Native populations and territories through a strategic mixture of retained, direct powers of the colonial government and powers exercised by Native institutions designed to the ultimate end of reinforcing the structure of colonial governance; and (2) the imposition of political, legal, economic and other governing forms on Native nations and people that ensure that Native institutions are integrated with and ultimately subordinated to the colonial power's machinery of government as well as to its priorities.

[24] Lugard 1906: 10.
[25] Cameron 1934: 1.
[26] Ibid.

Rule through Native Institutions

Lugard insisted in British Nigeria that while indirect rule was a powerful and important strategy of colonial rule, certain powers must remain the sole reserve of the Crown and never be left to Native institutions (1906: 296–98). He thought that the empire alone, for example, must have the power to retain armed forces, to tax, to dispose of lands as "Trustee for the Natives," including trusteeship over mineral rights (Lugard 1922), to legislate, and to set the limits on Native rule-making authority. The closer an issue came to being a purely internal and local matter of the governance, administration, and welfare of a specific Native community, however, the more likely it was to be devolved to tribes.

The contemporary self-governance era in the Native-U.S. relationship closely matches this pattern of Native governance.[27] Tribal powers of self-determination reflect a patchwork of areas of deep, self-governing authority and autonomy punctuated by other areas where the federal government has claimed continuing authority. Just as in British "native administration," in the United States the closer an issue comes to being a purely internal matter of the governance, administration, and welfare of a specific Native community—the local administration of housing, education, and health care trust services, for instance—the more likely it is to be devolved to tribes (Skibine 2008: 1010). The greater the impact of an issue or area of governance on non-Native people, however, or on the framework of Indian governance and administration *in general* as opposed to in the delivery of specific services or programs, the more likely the federal government is to restrict powers of Native self-governance and assert its own authority. For instance, while tribes now exert significant authority over many aspects of Native life on reservations, tribal legal and law enforcement authority, as described above, is explicitly circumscribed in its jurisdiction on the basis of the Native-status of those involved in a case as well as in its jurisdiction over some of the most serious categories of crime. Similarly, the exact physical limits of tribal authority are controlled by the U.S. federal government as disputes over the boundaries of Native lands are typically resolved in federal court. And in a clear parallel to Lugard's approach, the federal government in the United States has retained a close involvement in managing some "55 million surface acres and 57 million acres of subsurface minerals held in trust by the United States" for Native tribes and people.[28] In this as in other facets of contemporary indirect rule colonialism in the United

[27] That resemblance is in some respects direct; the Director of the Bureau of Indian Affairs and architect of the Indian Reorganization Act, John Collier, was directly influenced by European debates over the administration of African colonies and especially by British policies of indirect rule (Hauptman 1986).

[28] Bureau of Indian Affairs, 2016, "Who We Are," at: http://www.bia.gov/WhoWeAre/ (accessed 8 Aug. 2016). See also Norgaard 2014.

States, there is significant space for Native agency, however. Tribes have significant latitude under the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act (2012), and the Indian Mineral Leasing Act (1938) and Development Act (1982) to manage trust lands, but this legislation and the jurisprudence on Native mineral rights (e.g., *United States v. Navajo Nation*, 2009) also establish the limits and rules within which those powers can be exercised—the classic structure of empowerment of indirect rule regimes. The importance of these powers to limit Native control over territory are further evident in the recent Dakota Access pipeline confrontation and the curtailment of the Standing Rock and Cheyenne River Sioux tribes' efforts to forestall threats to water rights and sacred sites through executive regulatory decisions and federal court rulings.

The Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975 provides an important further illustration of the colonial indirect rule pattern. The ISDEAA, as amended in 1988, 1994, and 2000, and in combination with measures such as the HEARTH Act and the Native American Housing Assistance and Self-Determination Act (1996), is the centerpiece of contemporary tribal self-governance. ISDEAA required the secretaries of the Department of the Interior and the Department of Health and Human Services to issue contracts to provide trust services to tribes and tribal organizations that request them, with a few statutorily defined exceptions. Though its initial iteration provided for a limited range of Bureau of Indian Affairs services to be contracted to tribes, and under intrusive bureaucratic oversight, the Act has been amended to expand the range of services that can be contracted, to reduce bureaucratic oversight (particularly under Title V compacts), and to enhance tribes' flexibility to tailor the funding they receive to their own needs and priorities. Many tribes have seized upon these opportunities and have substantially improved the quality of trust service delivery and the lives of those who have a right to those services while simultaneously reinvigorating tribal sovereignty by reclaiming practical powers of self-governance. From the inception of the ISDEAA architecture, though, Congress has aimed, "to strike a balance between promoting tribal self-determination while maintaining federal oversight over tribal contracts" (Strommer and Osborne 2014: 24). For example, tribes have worked assiduously to expand the range of services that they can strike contracts or compacts to provide, and it has expanded, but that range remains firmly under the authority of Congress and the executive branch. Even when new self-governance possibilities emerge, as has occurred in the Department of Transportation for instance, they are often resisted or blocked entirely by the federal bureaucracy, requiring ongoing tribal lobbying to ensure the continued expansion of this form of governance (ibid.: 57–61).

Self-governance under the ISDEAA framework is thus both a real expansion of the agency, autonomy, and practical powers of self-governance by tribes and Native people in the United States and in exact conformity to the design of

colonial indirect rule described by Lugard. The powers of self-governance extended by indirect rule regimes always ultimately empower Native institutions in ways that reinforce the superordinate sovereignty, policy priorities, and governing structures of the colonial state. One of the main attractions of indirect rule for colonial powers as it relates to the ISDEAA provides further evidence of this observation. One of the reasons that Lugard preferred rule through Native institutions was the exact reason the scholarship on Native self-governance in the United States provides for explaining the tremendous social, political, and economic success of contemporary tribal self-governance: Native institutions are more responsive, more knowledgeable about problems and possibilities, and they have greater legitimacy in the communities that they serve than do distant or paternalistic outsiders (Cornell and Kalt 2010; Johnson and Hamilton 1995; Strommer and Osborne 2014). The greater efficacy of Native institutions in responding to local and culturally and politically specific circumstances, it is important to note, is both an advantage for the Indian people who have a right to these services, and for the overall stability of the colonial system in that the things most likely to have the most obvious impact on people's lives are delivered in a better and more politically palatable way. This arrangement, though, also runs in the direction of greater colonial regime stability when services are poorly handled by a tribe. The more that tribal authorities take over the provision of trust services, the more any blame for inadequacies in the provision of those services will fall on Native leaders rather than on the broader context of colonial administration.

Finally, perhaps the most general reason for the emergence of indirect rule as a template for British colonialism was its promise to lower the costs of empire. We see the same phenomenon in the U.S. case. Trust services are chronically underfunded (United States Commission on Civil Rights 2003), and that underfunding can and should be understood as part of an ongoing effort to reduce the costs of empire by using Native institutions to provide the machinery of government that is characteristic of indirect rule. Cook, for example, provides a detailed analysis of how the government-to-government policies pursued by the Reagan administration were intimately tied to its push for massive budget cuts to Bureau of Indian Affairs and other Indian services (1996). Freeing Native people and tribes from federal dependency by slashing budgets and encouraging contracting fit perfectly both the ideology of the Reagan revolution and the strategies of colonial indirect rule. A class-action settlement agreement between the U.S. Departments of Justice and Interior and Native tribes for $940 million finalized in early 2016 provides a good example of this pattern, acknowledging that the federal government severely underfunded the contract support costs due to tribes for the provisions of these services. More generally, during the self-governance era tribal funding has dropped as a percent of the federal budget, with particularly disastrous

downturns at the outset of self-governance in the 1980s.[29] To be clear, we do not dispute that ISDEAA self-determination contracts and compacts have yielded profound benefits for tribal self-determination; simultaneously, though, they have provided a further mechanism for the federal government to limit its financial commitments and shift the blame for service shortfalls to tribal providers. And this imposed equation, where funding is the required sacrifice for increased self-determination, would be perfectly familiar to Lugard.

Imposed Forms

In addition to the distinctive pattern of direct and indirect federal powers, the colonial character of this relationship operates at the culturally and institutionally deeper level of imposed forms (Mamdani 1996; Roberts 1990: 450). As Nadasdy writes of such colonial impositions, they can "transform" indigenous societies "in radical and often unintended ways" (2012: 503). We can see the effects of such impositions in the phenomenon of tribal disenrollment. One common political and legal construction of belongingness to a tribe today is "membership." Membership has a different connotation and derivation, though, than concepts of belonging like citizenship (used by some tribes), kinship, or other formulations derived from the more specific political and cultural history of a tribe and its people (Robertson 2013; Wilkins and Wilkins 2017). The widespread use of the concept of membership has had important consequences, Wilkins and Wilkins argue, because membership can be revoked more easily than other categories and conceptualizations of belonging. "Inadequate blood quantum or blood from a different Native nation, dual membership, fraud, error, misconduct, [or] failure to maintain contact" have all served as grounds for disenrollment, they write (2017: 59), which has since the 1970s led to an increase of disenrollment and banishment activity with the increasing power of tribes.

The rise of membership as a predominant concept of tribal belonging across societies with vastly different histories, cultures, and political traditions is not a historical and political accident, but an example of the imposition of sociopolitical forms that characterizes colonial indirect rule. The idea of membership as the primary category for constructing tribal belonging has a long history in Native-U.S. relations from invocations of membership in treaties[30] to the use of the concept of membership in federal legislation.[31] The Indian Reorganization Act (IRA) of 1934 gave membership a further and important restatement. The

[29] Maria Cantwell, "Senate Committee on Indian Affairs Oversight Hearing," 24 Nov. 2013, at: https://www.indian.senate.gov/news/press-release/sequestration-cuts-deeply-indian-country (accessed 24 Oct. 2017). See also Evans 2011: 36.

[30] E.g., "Treaty with the Cheyenne and Arapaho," 14 Oct. 1865, at: http: //avalon.law.yale.edu/19th_century/char65.asp (accessed 3 Dec. 2018).

[31] E.g., The Allotment Act (1887). We thank the anonymous *CSSH* reviewer who drew our attention to these points.

IRA brought the allotment era to an end and sought to put tribes on a more permanent footing. In doing so, though, it imposed a specific idea of what a tribe is and how it should be structured as an organization. Under the IRA, many tribes adopted constitutions and bylaws based on principles and model documents produced by the Bureau of Indian Affairs (Cohen 2006; Canby 2009: 67). While Native nations then and since have shaped their forms of government in ways that reflect their own political priorities, philosophies, and principles, that differentiation has occurred in the context of broad federal influences and constraints on the forms of tribal governance, as the proliferation of similar concepts of tribal governance—constitutions, by-laws, chairpersons, presidents—across politically and culturally diverse Native nations attests.

Sovereignty itself is a good example of the imposition of forms on Native societies. Alfred (1999), Nadasdy (2012), and others have argued that sovereignty should be understood as a foreign political form that may be strategically and politically useful at times, but should not be accepted as an indigenous concept of political authority (Alfred 1999: 55–58). Nonetheless, the "impairment of sovereignty" as a technique of colonial empire can be and has been operative even in societies in which the concept of sovereignty does not exist in indigenous thought and practice because it is routinely imagined and imposed by the colonial power. Indeed, from a colonial perspective, if indigenous sovereignty did not exist (because more culturally specific concepts defined the form and limits of authority) it would need to be imposed *so that it could be impaired* in a way that was legible to the colonial legal system.

There are further parallels between the U.S. case and the imposition of chiefs throughout European Africa. In "Colonial Chiefs in Chiefless Societies" (1971), Tignor examines the impacts of the British imposition of chiefs on the Kikuyu, Kamba, Masai, and Ibo nations. What these cases and the U.S. case have in common is that they show how the chief as a political form was an important tool of colonial politics, prompting its invention where it did not already exist and adaptation where it did. The U.S. government and its agents, for instance, historically enforced their invented image that all Natives are ruled by chiefs and warriors, men with the power to speak for their people and to strike treaties, no matter whether these assertions conformed to the actual socio-political system of the tribe in question. More generally, it shows how indirect rule regimes shape Native polities to fit the policies and machineries of governance of the colonial power (the requirements that tribes must meet to qualify for ISDEAA and other self-determination agreements provide another, more contemporary illustration).

One further example is warranted, in part because of its long-term catastrophic effects. The Dawes Act of 1887, also called the General Allotment Act, effected a sweeping imposition of forms on Native land and property conceptions. Specifically, its aim was to turn Indians into American farmers by turning collectively held tribal land into individual allotments. The Act gave

the president the power to break up reservations, to issue families 160-acre allotments, and to sell the "surplus" to white settlers. Even more devastating was that allotted parcels could be sold and taxed after a period of time. This imposed form of Native land-holding enabled a massive land transfer from Native to white hands, hollowing out vast swaths of the already drastically diminished territorial basis of Native nations.

Native governance in the United States is full of other vivid demonstrations of imposed political forms, from the powers over tribal termination it has historically wielded, to its power over the question of tribal recognition, to historical legislation of sweeping breadth such as the 1924 Indian Citizenship Act, by which Congress "declared to be citizens of the United States" all noncitizen Native people. While on this point the U.S. indirect rule regime was and is at odds with the racialized delimitation of citizenship employed by Lugard in West Africa, it has direct comparators in other sites and models of indirect rule colonialism, including French indirect rule in Africa that engaged deliberate experimentation with Native citizenship as a method for constructing a durable colonial empire—"creating French citizens out of Africans" (Crowder 1964)—as well as in British indirect rule in India in the later nineteenth and early twentieth centuries that involved constant experimentation with what Banerjee (2010) calls "imperial citizenship," involving multiple ways of parsing the rights, statuses, and boundaries defining colonial subjects and citizens.

What we conclude from this and the other evidence presented in this section is that the political status of Native tribes maps an oscillation between the two characteristic poles of colonial power: from the direct rule of early twentieth-century federal administration of the reservations to the indirect rule of contemporary policies of self-governance that promote the exercise of local autonomy by Native institutions as a way to further consolidate the overarching structure of colonial governance.

OTHERNESS

We have argued, so far, that the United States formally impairs the sovereignty of Native nations and does so in ways consistent with paradigmatic patterns and practices of colonial governance and administration. From the definition of colonial empire provided in the first section, we must now address the question of whether Native nations continue to be "other political societies" with respect to the United States.

Eliminationism (Wolfe 2006) has indeed been the policy of the United States toward Native people at multiple times.[32] Native peoples and polities in

[32] At times this has been explicit policy, as in the "termination era" of the 1940s–1960s, while in others elimination takes subtler guises such as through the social transformation of "American Indian" into a racial or ethnic minority status equivalent to other racial minorities and away from

the United States survived these onslaughts, and the conspicuous and officially acknowledged failure to eliminate tribes through termination and assimilation makes the assessment of socio-political "otherness" a simple empirical task. The distinctive character of Native tribes in the United States today is a point on which judicial decisions,[33] statutes,[34] and politicians from both parties agree.[35]

The most compelling evidence for the socio-political "otherness" of Native tribes and peoples in the United States, though, comes from Native tribes and peoples themselves. The Harvard Project on American Indian Economic Development puts it this way: "[It is due to the] phenomenal resilience of the Native people of North America [who] with tenacity in the face of odds stacked so heavily against survival for the last 500 years … enter the twenty-first century self-defined by their tribal identifications *today*, as Muckleshoot or Hopi or Omaha or Swinomish or Seneca or Lakota or Seminole or Wampanoag or Penobscot or Delaware or Chickasaw or Hualapai, and on and on through each culturally and politically distinct community" (Henson 2008: 2). Mamdani asks, "When does a settler become native?" And he answers: "Never. The only emancipation possible for settler and native is for both to cease to exist as political identities" (Mamdani 2012: 4). Far from ceasing to exist, hundreds of tribes and millions of tribal members continue to assert their inherent and ancient sovereignty as distinct political communities involved in nation-to-nation relationships with the United States, an entrenched and consolidated position of "otherness." In being neither a part of the colonial regime, nor free of it, they experience a prototypical situation of formal colonial rule. We view this history and the present reality as decisive on the question of political otherness.

a marker of the different status and rights entailed by indigeneity and membership in a sovereign tribe (see Porter 1999: 154–58; Champagne 2015).

[33] Among many examples, see *Worcester v. Georgia*, 31 U.S. 517 (1832); *U.S. v. Lara*, 541 U.S. 193 (2004).

[34] Among many examples, see the Indian Civil Rights Act (1968); and the Federally Recognized Indian Tribe List Act (1994).

[35] E.g., "Government-to-Government Relations with Native American Tribal Governments, Memorandum of April 29 1994," *Federal Register*, vol. 59, no. 85, p. 22951 (Clinton); "Presidential Proclamation." 31 Oct. 2014, at: https://www.whitehouse.gov/the-press-office/2014/10/31/presidential-proclamation-national-native-american-heritage-month-2014-0 (Obama); and "Memorandum on Government-to-Government Relationship with Tribal Governments." 23 Sept. 2004, at: http://www.presidency.ucsb.edu/ws/index.php?pid=64553 (Bush II). This political consensus on the part of the U.S. government may be coming under renewed threat. Donald Trump's "signing statement" on the 2017 Consolidated Appropriations Act, which forwarded the theory that "Native American Housing Block Grants" were a violation of the Fifth Amendment's equal protection provision, reveals that the president does not understand—or more darkly does not accept—that such appropriations are constitutional because of the status of tribes as distinct sovereigns to which the federal government has binding trust responsibilities. At: https://www.whitehouse.gov/the-press-office/2017/05/05/statement-president-donald-j-trump-signing-hr-244-law (all websites in this footnote last accessed 25 Oct. 2017).

IMPLICATIONS AND CONCLUSIONS

Taken together, the previous sections argue that the relationship between the United States and Native Nations does not merely approximate a colonial empire or share features with this political form—it is a paradigmatic example of it. We do not view this argument as an exercise in social scientific word play. While empire may rightly be a capacious term ranging from the political dynamics of nation-state formation (Adams and Steinmetz 2015) to global, informal networks of economic access and influence, formal colonial empire is a clear and distinct phenomenon within this conceptual space, with distinctive empirical characteristics and commonalities with other historical cases. We can draw a number of analytical, substantive, and moral implications from this exercise in classification.

It is striking that the case of the U.S. relationship with indigenous peoples and tribes today has been so comprehensively overlooked in the comparative literature on empire, even as United States overseas empire and imperialism have been routinely considered. While a multitude of scholars have taken on the parallels, or lack thereof, between the contemporary United States and the Roman Empire, for instance, the comparison between the political status of Native nations today and archetypal instances of European colonial empire like the British, Dutch, and French in Africa and Asia in the nineteenth and early twentieth centuries has been far less noted. We would proffer American exceptionalism as an explanation for this neglect. It is a recurrent trope in analyses of the relationship between the United States and Native American nations to describe the situation as a "unique relationship,"[36] an anomaly,[37] "unlike that of any other two people in existence … marked by peculiar and cardinal distinctions which exist nowhere else."[38] In its 1886 decision in *U.S. v. Kagama*, however, the Supreme Court puts this idea in a way that reveals it as more national myth than empirically supportable assessment: "The relation of the Indian tribes living within the borders of the United States … to the people of the United States has always been an anomalous one, and of a complex character…. [The Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full

[36] "Executive Order—Establishing the White House Council on Native American Affairs," 26 June 2013, at: https://www.whitehouse.gov/the-press-office/2013/06/26/executive-order-establishing-white-house-council-native-american-affairs (last accessed 4 Dec. 2018). For a statutory instance of the exact terminology of a "unique relationship" to reflect what has become a stock political trope for characterizing the Native-U.S. relationship, see the Native American Graves Protection and Repatriation Act (1990).

[37] Official Opinions of the Attorneys General of the United States: Advising the President and Heads of Departments in Relation to Their Official Duties, 1852, Washington, D.C.: Robert Farnham. See also Prucha 1997.

[38] *Cherokee Nation v. Georgia*, 30 U.S. 16 (1831).

attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations." These details, still sovereign but subordinated to a greater sovereign power, self-governing but only in a semi-independent way, describe not an *anomalous* political relationship, but a typical colonial one. Furthermore, by replacing anomaly with the acknowledgment of colonial empire, other "anomalies" also become clearer—from Hawai'i and Alaska to Guam, the U.S. Virgin Islands, the Northern Mariana Islands, American Samoa, Guantanamo Bay, and Puerto Rico—and the historical significance of "anomalous" episodes like the colonization of the Philippines is put into a different light as an episode in broader and longer-term colonial empire rather than an uncharacteristic foreign policy adventure (Williams 1980).

Identifying the United States today as a colonial empire is also important because it is a precursor to asking further social scientific, legal, and even political questions that adopt formal colonial empire as a premise. For instance, if the United States today is a formal colonial empire, then it is one of the longest lasting, most consolidated, examples of that political form known to history (though the framework we adopt here certainly suggests that colonial empire is a more common contemporary form of governance than is usually recognized). Why has the U.S. colonial system been capable of such longevity? How does such an intensive consolidation of colonial rule shape the possibility space for decolonization or even greater autonomy? This approach also allows us to pursue better insights into the nature of empires through comparative inquiry that places the U.S. case alongside other colonial empires.

These analytical benefits, we think, extend to better understanding the complex dynamics of the present U.S.-Native relationship. For instance, there are threats on the horizon for Native self-governance. While self-determination policies have since the 1970s received strong support from both Republicans and Democrats, there is some evidence that Republican support not only for funding self-determination programs but also for the principles of self-determination itself has been slipping (Cornell and Kalt 2010: 26). In its first year, the Trump administration fanned these fears. Its Interior Secretary, for example, seemed to moot a new allotment with talk of taking Native lands out of trust and putting them up for sale, while the Trump administration's 2018 budget calls for dramatic reductions in funding for programs and services that target Native Americans (Washburn 2017). These worrying developments emphasize the fact that the political, economic, and social achievements of Native people and tribes under self-governance are structurally vulnerable to the politics and policies of U.S. colonial administration.

We can similarly better understand other substantive current issues in Native society, from high rates of sexual violence to low school graduation rates to the reservation housing crisis, by examining how these phenomena are impacted by the political structures and vulnerabilities imposed on tribes

in the construction and consolidation of a formal colonial empire. Too often, analyses of such problems, when they are noticed by non-Indians at all, are fit into the "Indian problem" school of analysis. The defining feature of this way of thinking about Native issues is to attribute them to Indian pathologies. But the economic, social, cultural, political, and personal vulnerability experienced by Native people in the United States is better understood as a structural consequence of colonial empire. To make Native polities into colonial dependencies required that Native self-sufficiency be shattered. The land that supported the economic foundations of Native societies was transferred, mainly to whites, and replaced by, mainly, small reservations on marginal land; the capacity of Native polities to govern themselves has been subjected to centuries of U.S. intervention and interference; and the social bonds of Native peoples have been placed under continual, varied, and intense stresses by the imposition and consolidation of colonial rule. To knit one's brow at the "Indian problem" is an expression of the denial inherent to contemporary U.S. empire. These problems were in many cases created intentionally as tribes and reservations were shaped over centuries into colonies of the United States. Rendering the colonized vulnerable is another constant of imperial history.

Finally, the classification of the United States as a colonial empire is morally relevant. Colonialism has become a dirty word in global politics that entails a moral demand for further efforts at redress than have been forthcoming by the non-Native U.S. population and government. Efforts to obscure this connection of the contemporary United States to a morally polluted political category, from the language of denial from presidents through to the contortions evident in efforts to ensure that the international dialogue on colonialism and indigenous people's rights remains focused on so-called "blue water colonialism" instead of on colonialism as practiced today by settler colonial regimes, have been largely successful, at least as judged by the absence of the United States or similar contemporary cases from most social scientific literatures on empire and from the glare of documents such as the U.N. Declaration on De-Colonization (Asch 2014: 59–72). Laying a marker against those efforts is symbolically important even if a mere building block for more consequential redress. Further, our argument here pushes back against the idea that the age of formal colonial empire is past (Cooper 2005: 3; Steinmetz 2014: 78) and the corollary that the debate on contemporary empire must exclusively focus on broader forms of imperialism. We do not believe that formal colonial empire died sometime in the 1960s, and our analysis here invites the question of what other contemporary polities this shoe might fit. This claim is both analytical and morally significant, for if it is true then a widely repudiated form of political domination continues to operate even as it is denied. That deserves attention.

One of our intentions in this article is to help clarify the empirical foundation and epistemological status of the argument that the United States has the

relationship of a formal colonial empire to Native nations and peoples and that the political realities faced by Native peoples and tribes today are inexorably formed by the distinctive and historically prevalent imperatives and structures of colonial empire. Colonial erasure is a significant barrier to confronting and naming the real knots that U.S. policy has tied. By our lights, the proper reference for thinking about indigenous efforts to build postcolonial societies and nations is not colonial legacies, but instead ongoing colonial domination, a fact obvious to some scholars and disciplines, but largely overlooked by others. To develop clear definitions and bring data to bear on typological questions is one of the specialties of the social sciences. It is a particularly important role to play when conclusions cut against common knowledge. There is empirical, scientific, political, and moral value in using techniques of this sort to call things by their right names.

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Abstract: The article systematically assesses U.S.-Native relations today and their historical foundations in light of a narrow, empirical definition of colonial empire. Examining three core elements of colonial empire—the formal impairment of sovereignty, the intensive practical impairment of sovereignty through practices of governance and administration, and the continuing otherness of the dominated and dominant groups—we compare contemporary U.S.-Native political relations to canonical instances of formal colonial indirect rule empires. Based on this analysis, we argue that the United States today is a paradigmatic case of formal colonial empire in the narrow, traditional sense, one that should be better integrated into the comparative, historical, and sociological study of such formal empires. Furthermore, this prominent contemporary case stands against the idea that the era of formal colonial empire is over.

Key words: empire, colonialism, indirect rule, settler colonialism, U.S. empire, U.S. colonialism, Native Americans, sociology of law, comparative studies of empire, contemporary colonialism